IN THE

Supreme Court of the United States

October Term, 1962

No. 1009 2

ARTHUR HAMM, JR.,

Petitioner,

—v.—

CITY OF ROCK HILL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on December 6, 1962, rehearing of which was denied January 11, 1963.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina is reported at 128 S. E. 2d 907. It is set forth in the Appendix hereto, *infra* p. 5a. The order of the York County Court is unreported and is set forth in the Appendix hereto, *infra* p. 1a.

Jurisdiction

The judgment of the Supreme Court of South Carolina was entered on December 6, 1962, *infra* p. 5a. Petition for rehearing was denied by the Supreme Court of South Carolina on January 11, 1963, *infra* p. 11a.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3), petitioner having asserted below, and claiming here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Whether petitioner, a Negro, was denied due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States by the use of the state executive and judicial machinery to arrest and convict him of trespass where he had attempted to obtain service at a lunch counter previously reserved for whites in a store entirely open to the public?

2. Whether petitioner was denied due process of law secured by the Fourteenth Amendment in that the city was not required to elect a statute under which to prosecute but was permitted to rely on all the "available" law, including, but not limited to, three statutes which overlapped but were not coextensive, and in that petitioner was convicted and sentenced for the general offense of "trespass" without ever being informed of which statute—or common law rule—he had allegedly breached?

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 16-386, Code of Laws of South Carolina, 1952, as amended 1954:

Entry on another's pasture or other lands after notice; posting notice

Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing.

3. This case also involves Section 16-389 (2), Code of Laws of South Carolina, 1952, as amended 1960:

Any person:

(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned, within six months preceding, not to do so or

(2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative, shall on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

4. This case also involves Section 19-12, Code of Laws of City of Rock Hill:

Entry on lands of another after notice prohibiting the same

> Every entry upon the lands of another, after notice from the owner or tenant prohibiting the same, shall be a misdemeanor. Whenever any owner or tenant of any lands shall post a notice in four conspicuous places on the border of any land prohibiting entry thereon, and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county where such lands situate, a proof of the posting and publishing of such notice within twelve months prior to the entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for hunting and fishing.

Statement

Petitioner Hamm, a Negro student, was arrested for a sit-in demonstration at the lunch counter of McCrory's dime store in Rock Hill, South Carolina on June 7, 1960 (R. 14). He was convicted of trespass and sentenced to pay a fine of $100.00 or spend thirty days in jail (R. 116).

Hamm, along with Reverend C. A. Ivory, a Negro, now deceased, entered McCrory's dime store on June 7, 1960 in order to buy notebook paper and a trash can (R. 92). After the purchases were made, Reverend Ivory suggested to the petitioner that they eat at the lunch counter in the store (R. 84, 85). Reverend Ivory testified that he had heard of "one or two" Negroes who had "gotten some type of service" at the lunch counter (R. 94). Asked on cross-examination whether he believed he could obtain service, he replied, "yes" (R. 93, 94). Hamm seated himself on a stool at the lunch counter and Reverend Ivory, a cripple, remained in his wheel chair at the counter (R. 15).

The Manager of the store, H. C. Whiteaker, saw Hamm occupy a seat at the lunch counter and sent for a police officer (R. 76). Two policemen arrived and in their presence the manager asked Hamm and Reverend Ivory to leave (R. 77). There is a conflict in the record as to whether or not the police officer requested the manager to ask the two to leave (R. 16, 26, 95). It is clear, however, that the manager asked them to leave because they were Negroes (R. 77, 78). Hamm and Ivory were peaceful and orderly at all times and there was no question of offensive conduct (R. 24, 79). The manager testified that it was the policy of the store not to serve Negroes at the counter (R. 72). However, he did not ask that the two Negroes be arrested (R. 29).

McCrory's is a nationwide chain store which has no national policy with regard to segregation (R. 72). The store in question is admittedly open to all people, including Negroes (R. 71, 74). Thus, Negroes are free to purchase items at any counter in the store other than the lunch counter.

Petitioner Hamm, along with Reverend Ivory, was tried and convicted of "trespass" in the Recorder's Court of the City of Rock Hill on June 29, 1960 and sentenced to pay a fine of one hundred dollars ($100.00) or serve thirty (30) days in prison (R. 1, 116). On December 29, 1961 the convictions were affirmed by the York County Court, which noted the death of Reverend Ivory.

The Supreme Court of South Carolina affirmed the conviction of Hamm on December 6, 1962. Rehearing was denied on January 11, 1963.

How the Federal Questions Were Raised

At the commencement of the trial in the Recorder's Court of the City of Rock Hill, petitioner Hamm moved to require the City of Rock Hill to elect one statute under which to prosecute petitioner on the ground that prosecuting him under three separate statutes and all other "available" South Carolina law without an election violated the due process clause of the Fourteenth Amendment (R. 6). The motion was denied by the court (R. 13).

At the close of the prosecution's case petitioner Hamm moved for judgment of acquittal on the ground that the State of South Carolina by supporting a private policy of discrimination, violated the equal protection and due process clauses of the Fourteenth Amendment (R. 58, 59). The motion was overruled (R. 64). This issue was raised again and rejected at the conclusion of defendant's case by motion for a directed verdict (R. 98, 99); and after judgment, by motion for arrest of judgment or, in the alternative, for a new trial (R. 114).

On the appeal of petitioner Hamm and Reverend Ivory to the York County Court, the court stated that the offense of trespass had been stated with "reasonable and sufficient particularity." It stated that all other legal objections had been properly overruled and, relying on *City of Greenville* v. *Peterson*, 239 S. C. 298, 122 S. E. 2d 826, certiorari granted 370 U. S. 935 (No. 71, October Term, 1962), and *City of Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 512, certiorari filed April 7, 1962 (No. 89, October Term, 1962), affirmed the conviction of Hamm. The court also noted the death of Reverend Ivory.

On appeal the Supreme Court of South Carolina rejected Hamm's contention that an election should have been required, stating that no prejudice had resulted to the

appellant. It also rejected Hamm's argument that his arrest and conviction by state officials violated the Fourteenth Amendment, stating that "identical contention was made, considered and rejected" in the cases of *City of Greenville* v. *Peterson*, 239 S. C. 298, 122 S. E. 2d 826, certiorari granted 370 U. S. 935 (No. 71, October Term, 1962); *City of Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 512, certiorari filed April 7, 1962 (No. 89, October Term, 1962); *City of Columbia* v. *Barr*, 239 S. C. 395, 123 S. E. 2d 54, certiorari filed April 7, 1962 (No. 90, October Term, 1962); *City of Columbia* v. *Bouie*, 239 S. C. 570, 124 S. E. 2d 332, certiorari filed June 5, 1962 (No. 159, October Term, 1962).

Reasons for Granting the Writ

I

The State of South Carolina has enforced racial discrimination in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Petitioner seeks a writ of certiorari to the Supreme Court of South Carolina on the ground that his arrest and conviction constitute state enforcement of racial discrimination contrary to the equal protection and due process clauses of the Fourteenth Amendment. The South Carolina Supreme Court rejected this contention stating that "an identical contention was made, considered and rejected" in similar sit-in cases, *infra*, p. 10a.

State action enforcing racial discrimination and segregation is condemned by the equal protection clause of the Fourteenth Amendment. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483; *Shelley*

v. *Kraemer*, 334 U. S. 1; *Gayle* v. *Browder*, 352 U. S. 903. Moreover, state supported racial discrimination which bears no rational relation to a permissible governmental purpose offends the concept of due process. *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1.

Action by judicial officers is included within the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1. Similarly, the amendment covers action by police officials. *Taylor* v. *Louisiana*, 370 U. S. 154; *Garner* v. *Louisiana*, 368 U. S. 157; *Monroe* v. *Pape*, 365 U. S. 167; *Screws* v. *United States*, 325 U. S. 91. See also *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960); *Valle* v. *Stengel*, 176 F. 2d 697 (3d Cir. 1949).

Petitioner was arrested by a police officer of the City of Rock Hill (R. 28) even though the manager of the store did not request the arrest (R. 29). Indeed there is some testimony that the manager of the store was asked by the police to request petitioner to leave (R. 95). Even if the police did not initiate the request it is at least clear that they were enforcing a racially discriminatory policy of the store which was itself the reflection of community custom (R. 28). The manager testified, "I asked them to leave because we do not serve Negroes at the lunch counter" (R. 78). Such racial distinctions "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100. "For the state to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a state of the equal protection of the laws, in violation of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727 (dissenting opinion).

Any contention that preservation of the institution of private property requires the state to aid in the exclusion of Negroes in a situation such as this is ill-conceived. McCrory's is a national chain store with no national policy in regard to segregation (R. 72, 80). The manager testified that the store itself was open to all members of the general public including Negroes (R. 74). The lunch counter in question was an integral part of McCrory's operation.

The state involvement in the maintenance of segregation in McCrory's store is vividly brought out by reading the arrest warrant. There the City of Rock Hill emphasized that the lunch counter was "customarily operated upon a segregated basis," and that "racial tension was high due to numerous recent prior demonstrations against segregated lunch counters refusing service to members of the Negro race of the defendant, both within the city and throughout the south generally." It is clear from the warrant that state officials arrested Hamm not for any offensive conduct on his part, but simply because he was a Negro.

Factual and legal issues like those raised in this case are now before this Court in a number of cases, some of which have been argued, *Avent* v. *North Carolina*, 253 N. C. 580, 118 S. E. 2d 47, certiorari granted 370 U. S. 934 (1962) (No. 11, October Term, 1962); *Greenville* v. *Peterson*, 239 S. C. 298, 122 S. E. 2d 826, certiorari granted 370 U. S. 935 (No. 71, October Term, 1962), and some of which are pending decision on petition for writ of certiorari, *City of Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 512 (No. 89, October Term, 1962); *City of Columbia* v. *Barr*, 239 S. C. 395, 123 S. E. 2d 54 (No. 90, October Term, 1962); *City of Columbia* v. *Bouie*, 239 S. C. 570, 124 S. E. 2d 332 (No. 159, October Term, 1962). The last four cases were relied on by the Supreme Court of South Carolina in rejecting the constitutional objections raised by petitioner in this case.

When questions presented in a petition for writ of certiorari are identical or similar to questions in another case in which the court has already granted certiorari, the issues involved in the petition are appropriate for review by certiorari. Compare *Trustees of Monroe Avenue Church of Christ* v. *Perkins*, 334 U. S. 813, with *Shelley* v. *Kraemer*, 334 U. S. 1.

Compare *Edwards* v. *South Carolina*, —— U. S. ——, 9 L. ed. 2d 697 and the disposition of *Fields* v. *South Carolina*; 31 U. S. L. Week 3297.

II

The City of Rock Hill was permitted to prosecute petitioner Hamm for violation of all the "available" South Carolina law including, but not limited to, three vague statutes with dissimilar provisions; he was sentenced and convicted for the general offense of "trespass" without ever being informed of which statute he had breached; all of which violated his rights under the due process clause of the Fourteenth Amendment.

Before the commencement of the trial in the Recorder's Court of the City of Rock Hill, petitioner Hamm asked the prosecutor to inform him under which statute the warrant had been drawn and on which statute the prosecution was relying for a conviction. The prosecutor declined to do so stating that the city "relies upon all the available law that has a proper bearing upon a relationship to the offense charged" (R. 6). The most he would reveal was that the city, "*amongst other things*," was relying on Section 16-386, Code of Laws of South Carolina, 1952, as amended 1954; Section 16-388 (2), Code of Laws of South Carolina, 1952, as amended 1960; and Section 19-12, Code of Laws of City of Rock Hill (R. 8). He mentioned those "without waiving

the right to rely upon any other sections" and he stated that Hamm could be found guilty of trespass "without reference necessarily to what particular statute or ordinances he is charged under" (R. 11, 12). The Recorder's Court supported the city in its refusal to be specific, stating, "The warrant informs the defendant of what he is charged . . ." (R. 13).

Thus the city was allowed to prosecute Hamm for the generic offense of trespass, bringing to bear the whole body of "available" (R. 6) or "applicable" (R. 11) South Carolina law including three specific statutes which, as will be shown below, covered conduct which was in some respects the same, in some respects different. Despite the fact that "good pleading would unmistakenly inform the accused as to the law he is alleged to have violated . . ." *Corson* v. *U. S.*, 147 F. 2d 437, 438 (9th Cir. 1945), Hamm was forced to defend himself against an amorphous mass of South Carolina law.

This mass of law may have included South Carolina's vague crime of breach of peace. See *Edwards* v. *South Carolina*, —— U. S. ——, 9 L. ed. 2d 697, or even common law trespass, for the warrant alleged a general state of facts which could relate to any of the named statutes and which appeared to include other elements. As the warrant was phrased, it included not only elements of trespass, but also elements of breach of peace. When it referred to high racial tension, numerous anti-segregation demonstrations, and recent trials of demonstrators on charges of breach of peace, and when it implied that petitioner Hamm and his companion were helping to create this tension, it introduced elements which could only confuse Hamm in his defense. This confusion was compounded in the judge's charge to the jury. Here again it seemed that breach of peace was made an essential element of Hamm's crime.

The judge charged "trespass to property is a crime at common law when it is accompanied by or tends to create a breach of the peace. When a trespass is attended by circumstances constituting breach of the peace, it becomes a public offense, subject to criminal prosecution" (R. 103). Both from the warrant and the charge to the jury, petitioner Hamm was justified in believing that if the state could not prove that public disorder had been an element in this situation, it had not proved its case.

Without specific knowledge of the statute he was charged with violating, petitioner Hamm could not prepare an adequate defense for "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. Certainly it is basic to due process that a defendant should not be forced to guess what laws he is charged with violating.

Petitioner Hamm's rights were further denied because he was not informed of what statute he had been convicted. The jury simply found him guilty of the generalized offense of trespass (R. 112). The sentence of thirty days in jail or one hundred dollars fine could be imposed under Section 16-386, Section 16-388 (2), Section 19-12 of the City Code, or some other "applicable" statute. The statutes mentioned by the prosecutor prohibited dissimilar conduct. Hamm had no way of knowing how the prosecution met its burden of proving violation of a statute. Nor did he know whether he was convicted of violating an unconstitutional statute. This defect of not knowing the statute he allegedly breached was not cured by the fact that Section 16-388 (2) was one of the things read when the Recorder attempted to define trespass for the members of the jury (R. 102). Petitioner was neither found guilty of any particular statute or statutes nor was he acquitted of any others.

Petitioner's difficulties were enhanced because those statutes which were mentioned as outlawing his conduct, on their face, outlawed dissimilar conduct, so that trespass under the one might not be trespass under the other.

While Section 16-386, Code of Laws of South Carolina, 1952 and Section 19-12, Code of Laws of City of Rock Hill are similar, Section 16-388 (2), Code of Laws of South Carolina, 1952, as amended 1960, is substantially different. Section 16-386 and Section 19-12 prohibit entry on lands of another only "after notice from the owner or tenant prohibiting such entry." The notice can be given by posting notices on the borders of land. Section 16-386 on its face applied only to farm land and, at the time of the trial in this case it had never been construed as requiring a person who entered a business at the invitation of the owner to leave when asked.[1]

Section 16-388 (2) on its face prohibits conduct completely unlike that prohibited by Section 16-386. It requires:

(1) That a person enter a place of business. (2) That he be requested by the person in possession or his agent or representative to leave. (3) That he refuse to leave. (4) That he have no good cause or excuse for his refusal to leave.

Thus Section 16-386 and Section 19-12 on the one hand, and Section 16-388 (2) are different in at least four respects. First of all the conduct prohibited by Section 16-386 and Section 19-12 is entry after notice, not as in Section 16-388 (2) remaining after notice. Secondly, while

[1] *City of Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 512, certiorari filed April 7, 1962 (No. 89, October Term, 1962), which expanded Section 16-386 to include conduct like that of this petitioner, had not yet been decided by the Supreme Court of South Carolina when this case was tried.

all three statutes make provision for actual notice, both Section 16-386 and Section 19-12 provide for constructive notice. Thirdly, when actual notice is given under Section 16-386 or Section 19-12 it must be given by the "owner or tenant," not by "the person in possession, or his agent or representative" as in Section 16-388 (2). Finally, there is no "good cause or excuse" requirement in Section 16-386 and Section 19-12 as there is in Section 16-388 (2). Hamm was therefore placed in the unfair position of defending against the whole body of "available" South Carolina law including specified statutes which prohibited dissimilar conduct.

In addition to being forced to defend himself without knowing under which statute or ordinance he was charged, the particular statutes and ordinances mentioned by the prosecutor as possibly providing a basis of conviction all contain vague and ambiguous provisions.

Both Section 16-386 and Section 19-12 of the Code of Laws of City of Rock Hill prohibit "entry" on another's land "after notice" from the owner or tenant. However, Negroes, including Hamm, were welcome to enter the store. Hamm was convicted only by expanding the words "entry after notice" to "remain after notice."[2] But it is well settled that "judicial enlargement of a criminal act by interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce v. U. S.*, 314 U. S. 306, 311.

Section 16-388 (2) is also unconstitutionally vague when applied in this situation. It states that a person must leave the premises when asked unless he has good cause or excuse not to leave. Nowhere in Section 16-388 (2) are the words "good cause or excuse" defined. No standards are set out

[2] See footnote 1.

by which Hamm and others similarly situated could know what amounts to "good cause or excuse." Certainly, in a store open to the public, including Negroes, where Hamm has purchased items and where he is orderly in every way, he should expect that he has "good cause or excuse" not to leave. In his instructions to the jury, the City Recorder stated that "good cause or excuse" meant "one valid in the eyes of the law, and under existing circumstances, not merely a personal cause or excuse of insufficient stature to have any legal force" (R. 104), but he refused to charge that race could not be the basis of a violation of the statutes (R. 105, 106). But if as a matter of law a Negro has no "good cause" to request service at a "whites only counter" the statute runs afoul of Mr. Justice Stewart's condemnation of legislative enactments "authorizing discriminatory classification based exclusively on color." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727 (concurring opinion). The vice in this section lies not only in the fact that the legislature has set no guidelines to determine the breach, but also in the fact that it has given such power to the manager of a store, permitting him to use the arbitrary classification of race as a basis for violation. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391.

In the case of *Thornhill* v. *Alabama*, 310 U. S. 88, a provision similar to this one was held to be too vague to

warrant a conviction of the accused. In that case a state statute said that any person who "without a just cause or legal excuse therefor" loitered about or picketed the place of business of another person could be imprisoned. The Court condemned the use of the words "without a just cause or legal excuse" saying that they did "not in any effective manner restrict the breadth of the regulation"; and that "the words themselves have no ascertainable meaning either inherent or historical" (310 U. S. at 100). Under this reasoning Section 16-388 (2) must also be held too vague to meet the requirements of fair notice.

Moreover, if it cannot be known from the record whether or not a defendant was convicted under an unconstitutionally vague statute, the conviction cannot stand because of the indeterminate possibility that it was premised on another provision of law not subject to the same infirmity. *Stromberg* v. *California*, 283 U. S. 359, 368. In *Stromberg* the court, noting that the defendant had been convicted under a general jury verdict which did not specify which of three statutory clauses it rested on, concluded that "if any of the clauses is invalid under the Federal Constitution, the conviction cannot be upheld." The principle was followed in *Williams* v. *North Carolina*, 317 U. S. 387, 392, when the court said:

> "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury would be to countenance a procedure which would cause a serious impairment of constitutional rights."

Certiorari should be granted for the additional reason that the City of Rock Hill, by burdening defendant with the whole body of "available" South Carolina law, by speci-

fying only statutes which were dissimilar and too vague to give Hamm notice that they prohibited his conduct, and by convicting him of the generalized offense of trespass without reference to a particular statute, violated Hamm's rights under the due process clause of the Fourteenth Amendment.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE YORK COUNTY COURT

CITY OF ROCK HILL,

—v.—

ARTHUR HAMM, JR.

APPEAL FROM THE RECORDER'S COURT OF THE CITY OF ROCK HILL

Order

This Court now has before it for consideration a total of seventy-one cases which were heard by the Recorder's Court for the City of Rock Hill. The convictions of all defendants were in due time appealed to this Court and heard together by this Court on an agreed Transcript of Record. By occurrence and charge the cases are grouped as follows:

1. Sixty-five breach of peace charges, upon the public streets at City Hall, on March 13, 1960.

2. Three breach of peace charges, upon the public streets at Tollison-Neal Drug Store, on February 23, 1961.

3. One Trespass charge within McCrory's variety store, on April 1, 1960, before enactment of the 1960 Trespass Act (No. 743).

4. Two Trespass charges, within McCrory's variety store, on June 7, 1960, after enactment of the 1960 Trespass Act.

Order

An examination of the Transcript of Record on Appeal discloses no real distinction between the first sixty breach of peace cases at City Hall, the next five on the same day at the same place only a short time later, and the three breach of peace cases on the public streets at Tollison-Neal Drug Store. In all of these cases it appears from the record that the public peace was endangered, that the defendants were properly forewarned by a police officer to cease and desist from further demonstrations at that time and place, and move on, which they failed and refused to do, despite allowance of ample time within which to have complied with the order, and that thereafter they were arrested and charged with breach of peace as continuance of their activities under the circumstances then existing, as shown by the record, constituted open defiance of proper and reasonable orders of a police officer and tended with sufficient directness to breach the public peace.

The offense charged in each of the sixty-eight breach of peace cases is clearly made out under the facts shown by the Transcript of Record and the law of force in this state, particularly as the law is shown by the recent decision of the South Carolina Supreme Court in the case of *State* v. *Edwards et al.*, Opinion No. 17853, filed December 5, 1961.

In like manner this Court finds no distinguishing features between the one trespass case, which occurred at one time and place and the two later trespass cases at the same place. In all three cases each defendant was asked to leave the premises by the Manager of the store, this occurred in the presence of a city police officer, who then himself requested each defendant to leave and explained that arrest would follow upon failure to leave. After each defendant

failed to leave the private premises involved, following allowance of a reasonable opportunity after request so to do, first by the Manager and then by the police officer, each defendant was arrested and charged with trespass. Here again, under the facts disclosed in the record and the law of force in this state, the charge of trespass is properly made out as to each defendant. See *City of Greenville* v. *Peterson et al.*, S. C. Supreme Court Opinion No. 17845, filed November 10, 1961, and *City of Charleston* v. *Mitchell et al.*, S. C. Supreme Court Opinion No. 17856, filed December 13, 1961.

A number of specific legal questions were raised by the Defendants, including particularly a question as to adequacy and sufficiency of the warrants and whether or not the Defendants were properly advised of the charges pending against them. An examination of the warrants discloses that in each case the facts constituting the offense charged were stated with reasonable and sufficient particularity. It is the opinion of this Court that the various legal objections raised in the court below, which are not set forth in detail herein, were properly overruled. See *State* v. *Randolph et al.*, 239 S. C. 79, 121 S. E. (2d) 349, filed August 23, 1961, other authorities cited herein, and other applicable decisions of our Courts referred to in the cited authorities.

Accordingly, it is hereby *ordered and decreed* that the convictions by the Recorder's Court of the City of Rock Hill in all of the seventy-one cases under appeal are hereby affirmed, and each of the cases is remanded for execution of sentence as originally imposed.

This Court takes note, from published reports, of the untimely death of the Defendant, Rev. C. A. Ivory, since

hearing of the appeals herein and before rendering judgment thereon.

All of which is duly ordered.

GEORGE T. GREGORY, JR.,
Residing Judge, Sixth Judicial Circuit.

Chester, S. C.,
December 29, 1961.

Opinion by Moss, *A.J.*

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CITY OF ROCK HILL,

Respondent,

—v.—

ARTHUR HAMM, JR.,

Petitioner.

APPEAL FROM YORK COUNTY, GEORGE T. GREGORY, JR., JUDGE

Moss, *A.J.*:

Arthur Hamm, Jr., the appellant herein, was convicted in the Recorder's Court of the City of Rock Hill on June 29, 1960, of the charge of trespass, in violation of Section 16-388 (2) as is contained in the 1960 Cumulative Supplement to the 1952 Code of Laws of South Carolina. The judgment of conviction was affirmed on December 29, 1961, by the Honorable George T. Gregory, Jr., Resident Judge of the Sixth Circuit. This appeal followed.

The evidence shows that on June 7, 1960, the appellant, along with Rev. C. A. Ivory, now deceased, entered the premises of McCrory's Five and Ten Cent Store in the City of Rock Hill, South Carolina. Ivory was a cripple and confined to a wheelchair. He was pushed into the store by the appellant. Ivory and the appellant proceeded down the aisles of the store and made one or two purchases. Thereafter, they proceeded to the lunch counter, operated by

McCrory's. Ivory, still in his wheelchair, came to a stop between the stools at the said counter. The appellant took a seat on a stool at the lunch counter. The appellant and Ivory sought to be served. They were not served and were asked to leave the lunch counter. Upon their refusal to leave at the request of the manager of McCrory's store, they were placed under arrest by police officers of the City of Rock Hill.

The first question for determination is whether the City Recorder committed error in refusing to require the City of Rock Hill to elect whether the prosecution was under Section 16-386 or Section 16-388, Code of Laws of South Carolina, or Section 19-12, Code of Laws of the City of Rock Hill.

It should be borne in mind that the warrant charged the appellant with committing a trespass on June 7, 1960, and that he,

> "did willfully and unlawfully trespass upon privately owned property by remaining along with one Rev. C. A. Ivory at the lunch counter in McCrory's variety store, which is customarily operated upon a segregated basis, and refusing to leave said counter, after the manager of said store, in the presence of City Police Capt. John M. Hunsucker, Jr., advised him he would not be served and specifically requested him to leave said lunch counter, and after the aforesaid police officer thereupon advised him that he would be arrested for trespass unless he left said premises as directed, which he nevertheless failed and refused to do, * * * ."

The appellant asserts that under Section 15-902 of the 1952 Code of Laws of South Carolina that whenever a person is accused of committing an act which is susceptible of

being designated as several different offenses that the Municipal Court upon a trial of such person shall be required to elect which charge to prefer and a conviction of an offense upon such an elected charge shall be a complete bar to further prosecution for the alleged offense. An examination of the warrant here shows that the only offense charged against the appellant was that of a trespass and the warrant above quoted, in our opinion, charges a violation of Section 16-388 of the 1960 Cumulative Supplement to the Code, which provides that:

"Any person:

"(2) Who, having entered into the dwelling house, place of business or on the premises of another person • • • and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

"Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days."

The warrant under which the appellant was prosecuted plainly and substantially sets forth the acts of the appellant and thus informed him of the nature of the offense against him, in accordance with Section 43-111 of the 1952 Code. *City of Charleston* v. *Mitchell, et al.*, 239 S. C. 376, 123 S. E. (2d) 512, and *City of Greenville* v. *Peterson, et al.*, 239 S. C. 298, 122 S. E. (2d) 826.

This case was tried by the Recorder of the Municipal Court of Rock Hill, with a jury. The Recorder, in delivering his charge to the jury, gave the following instructions:

"Now, this defendant is charged under a warrant issued by the city of Rock Hill with the offense of trespass. I am not going to read this warrant to you. It has been read to you and it has been discussed, and you know what is in the warrant. If you want to know then what is meant by trespass, what does trespass mean, I am going to read to you a portion of an Act of the General Assembly which became law on the 16th day of May, 1960, reading you only a portion of it, and that portion which applies in this particular case.

"Any person who, having entered into a place of business or on the premises of another person, firm, or corporation, and fails and refuses without good cause or good excuse to leave immediately upon being ordered or requested to do so by the person in possession, or his agents or representatives, shall on conviction be fined not more than $100.00 or be imprisoned for not more than thirty days."

It is readily apparent that the Recorder submitted to the jury only the question of whether the appellant was guilty of the offense of trespass as is defined by an Act of the General Assembly, approved May 16, 1960, 51 Stats. 1729, now incorporated in the 1960 Supplement to the Code as Section 16-388 (2).

Should the City Recorder have required an election by naming the statute under which the prosecution was brought? We think not. The warrant here charged a single offense of trespass upon facts which are not in dispute. In 27 Am. Jur., indictments and informations, Section 133, at page 691, we find the following:

"• • • There need, of course, be no election where the indictment or information charges only one offense

and the several different counts are merely variations or modifications of the same charge. This rule has been applied to an indictment where an unlawful act relied on by the state as the basis for the charge was made unlawful by more than one statute, it being held that in such case it is error to compel the state to elect upon which statute it relies for a conviction. • • • ." *State* v. *Schaeffer*, 96 Ohio St. 215, 117 N. E. 220.

In 42 C.J.S., Indictments and Informations, Section 185, at page 1149, we find the following:

"• • • No election is necessary where the indictment, properly construed, charges but one offense although several acts comprising the offense are included, or several methods by which the offense may have been committed are stated. The prosecuting attorney is not required to state at the trial the particular section of the code under which accused is being tried where the offenses or acts with which accused is charged are fully set out, nor is he required to elect where the offenses defined by the various statutes are included within the crime charged, • • • ."

And again:

"• • • Although no express statement of election is made by the prosecution, accused is not prejudiced where the trial in fact proceeds on only one charge, or appropriate instructions are given to the jury. • • • ."

There is nothing substantial in the objection that the City Recorder refused to require the city of Rock Hill to elect the particular statute upon which the prosecution was based. The warrant charged a single offense of trespass

and the Recorder submitted to the jury only the question of whether the appellant was guilty of trespass as such was defined in the statute heretofore cited. There was no prejudice to the appellant.

The record shows that the appellant and the Rev. C. A. Ivory are Negroes. It was the policy of McCrory's store not to serve Negroes at its lunch counter. The appellant asserts by exceptions 3, 4 and 5 that his arrest by the police officers of the city of Rock Hill and his conviction of trespass that followed was in furtherance of an unlawful policy of racial discrimination and constituted State action in violation of his rights to due process and equal protection of the laws under the Fourteenth Amendment to the United State Constitution. Identical contention was made, considered and rejected in the cases of *City of Greenville* v. *Peterson, et al.*, 239 S. C. 298, 122 S. E. (2d) 826; *City of Charleston* v. *Mitchell, et al.*, 239 S. C. 376, 123 S. E. (2d) 512; *City of Columbia* v. *Barr, et al.*, 239 S. C. 395, 123 S. E. (2d) 521; and *City of Columbia* v. *Bouie, et al.*, 239 S. C. 570, 124 S. E. (2d) 332, in each of which was involved a sit-down demonstration similar to that disclosed by the uncontradicted evidence here, at a lunch counter in a place of business privately owned and operated, as was McCrory's in the case at bar.

All exceptions of the appellant are overruled and the judgment appealed from is affirmed.

Affirmed.

TAYLOR, *C.J.*, LEWIS and BRAILSFORD, *JJ.*, concur. BUSSEY, *A.J.* did not participate.

Petition for Rehearing and Petition for Stay of Remittur

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Case No. 4912

CITY OF ROCK HILL,

Respondent,

—v.—

ARTHUR HAMM, JR.,

Appellant.

Supreme Court of South Carolina
Clerk's Office, Columbia, S. C.
Filed December 17, 1963
Frances H. Smith, Clerk

Petition denied.

Supreme Court of South Carolina
Clerk's Office, Columbia, S. C.
Filed January 11, 1963
Frances H. Smith, Clerk

C. A. TAYLOR, C.J.
JOSEPH R. MOSS, A.J.
J. WOODROW LEWIS, A.J.
J. M. BRAILSFORD, A.J.